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JOSEPH MEADE BAILEY, 1833-1895

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PART II†

DURING the spring of 1888 the lawyers of the sixth judicial district learned that their representative on the Illinois Supreme Court, the venerable Justice Benjamin R. Sheldon,¹ had determined to retire at the expiration of his term. Judge Bailey, whose sterling service on the Appellate Court bench had marked him as one well qualified for that honor, was the one chosen as successor to Sheldon. The honor, not unsought, became the realization of a long-cherished ambition when, following the election of June 4, 1888, he took the oath of office and entered into the final phase of his career.²

The qualities which had endeared him to his collaborators in the Appellate Court served him in good stead and soon secured for him the respect and friendship of his associates on the Supreme Court. The words of Judge Shope speak eloquently:

I learned first to admire him, then to respect him, and finally to

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† Part I appeared in 16 CHICAGO-KENT REVIEW 1.

¹ Judge Sheldon, born in 1811, was elected to the Supreme Court in 1870 and re-elected in 1879 for a full term of nine years. He had served the state in some judicial capacity since 1848. See memorial proceedings in 173 Ill. 9.

² See response of Justice Wilkin to memorial offered to the Supreme Court of Illinois on March 28, 1896, in 162 Ill. 9 at 14.

love him. He was a model Judge, combining as he did the widest learning with the most unwearied industry and the loftiest integrity. To that it must be added that he soon became noted for his powers of research and his keen analysis.³

The close application which he had given to his work on the Appellate Court bench did not pass unnoticed among his brethren, who often found him in the middle of the night clicking away on a typewriter. As a consequence, all knew that when the court met he would have exactly as many opinions to read as there had been cases referred to him.⁴ Of value, too, was his persistent and aggressive conduct in the conference room; yet it was not done in any opinionated fashion, for he was extremely amiable, pleasant, and helpful and would readily yield to legal authorities when they could be cited against him.⁵

So unwearied was his industry that during the time he served, less than one full term, he wrote majority opinions in 334 cases, as well as one concurring opinion and five dissents.⁶ It must not be understood, however, that he immured himself in chambers throughout this period, for he continued to serve the community with unbounded energy in many other respects. He remained both dean and lecturer of the Chicago College of Law until the time of his death.⁷ He served on the boards of trustees of both the old University of Chicago and the new university which had been organized by John D. Rockefeller in

³ The Chicago Tribune, Oct. 17, 1895, Vol. LIV, No. 290, p. 5.

⁴ Ibid.

⁵ A personal note is furnished by the reminiscence of his judicial co-worker, Simeon P. Shope, who once said, "Whatever acerbity might exist at times among the court, it never included him [Judge Bailey]. I have seen Judge Magruder jump on him and roast him unmercifully, but I could never see that it ruffled his temper any more than if a fly had lit on his shoulder." Chicago Tribune, Oct. 17, 1895, Vol. LIV, No. 290, p. 5.

⁶ The opinions are scattered through thirty-four volumes of Illinois Supreme Court reports, numbered from Vol. 126 to Vol. 160 inclusive.

⁷ Original institution reorganized in 1889 as Chicago College of Law. Soon after became Law Dept. of Lake Forest University. Kent Law School, incorporated in 1892, changed corporate name to Kent College of Law in 1894, and combined with Chicago College of Law in 1900, at which time name of Chicago-Kent College of Law was adopted. Separation from Lake Forest University occurred in 1902.

1890,⁸ as well as that of Lake Forest University. He gave generously of his time to his fraternal organizations⁹ and did not neglect the affairs of his church, which he served in the capacity of moderator.

Much could be said about his public services, but the principal service he rendered to the lawyer of Illinois was in shaping the path and direction of the law. He was generally a conservative man,¹⁰ but he could, when occasion demanded it, open new avenues for the progress of the law. The oppressor learned from him that the law was a still mightier force,¹¹ while the cheater found that his ill-gotten gains could be wrested away no matter how devious his schemes.¹² Praise becomes fulsome, since his own acts establish far better the character of the man. Socrates once fixed the measure of a good judge when he said: "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially." How well Judge Bailey fitted that measure can best be found from an analysis of some of his decisions.¹³

⁸ John Moses and Joseph Kirkland, *History of Chicago* (Chicago, Ill.: Munsell & Co., 1895) II, 117; Paul Gilbert and Charles Lee Bryson, *Chicago and its Makers* (Chicago, Ill.: Felix Mendelsohn, 1929), 190.

⁹ He was a Sovereign Grand Inspector General 33° A.A.S.R., Honorary Member of the Supreme Council, N.M.J., U.S.A., and a Knight Templar. In 1883 Judge Bailey made a pilgrimage to Europe with Apollo Com-mandery, where, in consideration of his worth and distinguished Masonic rank, he was made an honorary member of Ancient Ebor Preceptory No. 101. See *Chicago Legal News*, Oct. 19, 1895, Vol. 28, No. 8, p. 60. He was also a member of the Greek social fraternity of Alpha Delta Phi, into which he had been initiated during his college days.

¹⁰ See his decisions involving contracts against public policy in *Moore v. Bennett*, 140 Ill. 69, 29 N. E. 888 (1892), where the court reporters attempted to prevent free and unrestricted competition in their business; and *Ramsey v. People*, 142 Ill. 380, 32 N. E. 364 (1892), holding a statute unconstitutional which attempted to regulate the manner of computing the wages of miners working on a per ton basis.

¹¹ *Distilling and Cattle Feeding Company v. People ex rel. Moloney*, 156 Ill. 448, 41 N. E. 188 (1895), in which the "Whiskey Trust" was struck down as a monopoly.

¹² *Middaugh v. Fox*, 135 Ill. 344, 25 N. E. 584 (1890), reads like a novel and tells the tale of a broken trust reaching back into the days of the gold rush of 1849.

¹³ Space would prevent giving consideration to all of his opinions. Those which have been selected are but a portion of many equally worth discussing. The choice was arbitrary, and no significance should be based on the order of presentation, though related topics have been treated together.

The first case in which Judge Bailey participated on his accession to the Supreme Court plunged him immediately into a policy-making career as a judge. That case¹⁴ involved an attack on the constitutionality of a statute¹⁵ concerning the venue of criminal prosecutions arising from criminal acts occurring aboard railroad trains in operation. The defendant was accused of murdering an express messenger on duty on a train operating between Chicago and Burlington, Iowa. The prosecution was instituted in Grundy County, where the crime was discovered, though it might have occurred in Will County, next adjoining. Basing his decision on a change in the language of the appropriate constitutional provisions,¹⁶ he held the statute valid and affirmed the conviction, pointing out that to hold otherwise would deny the state an opportunity to punish criminals in such cases no matter how guilty they might be, since proof of the exact venue, if the accused did not confess, was impossible.¹⁷

The constitutional guarantees of accused persons were not questioned, however, when the law appeared certain. Thus, in *Harris v. People*,¹⁸ he went as far back as *Lord Dacre's Case*¹⁹ in the reign of King Henry VIII to establish the fact that the proper tribunal for the trial of criminal cases consisted of a judge and jury, no part of which could be waived by the litigants, except where the defendant pleaded guilty; and consequently he freed, on habeas corpus, a convicted defendant who had submitted

¹⁴ *Watt v. People*, 126 Ill. 9, 18 N. E. 340 (1888).

¹⁵ Ill. Rev. Stat. 1937, Ch. 38, § 710.

¹⁶ Illinois Constitution, 1870, Art. II, § 9, varies from the language found in the earlier constitutions, since it provides for a speedy trial in the county where the crime is "alleged" to have been committed. Compare with Illinois Constitution, 1848, Art. XIII, § 9, and Illinois Constitution, 1818, Art. VIII, § 9.

¹⁷ Judge Scholfield dissented on the basis of his own decision in 110 Ill. 29 (1884), in which he had, prior to Judge Bailey's advent on the bench, held unconstitutional a somewhat similar provision found in Ill. Rev. Stat. 1937, Ch. 38, § 704, relating to offenses occurring on county line roads.

¹⁸ 128 Ill. 585, 21 N. E. 563 (1889).

¹⁹ Kel. J., 56, 84 Eng. Rep. 1080 (1534).

her case to the trial judge alone.²⁰

Of much the same nature was another case, also entitled *Harris v. People*,²¹ in which the defendant had not been present, so far as the record disclosed, at the time his motion for new trial was passed upon and the sentence had been pronounced. Judge Bailey held that the presence of the defendant, if he was already in custody, was not essential at the hearing on the motion for new trial, but that his presence was indispensable at the time judgment was rendered and that any judgment pronounced in his absence was necessarily void. This decision, however, was of small consolation for the defendant, as the judge went on to point out that only the judgment order was void, so that no new trial was necessary; and the case was remanded simply to grant defendant his right to appear personally and stand for judgment. Like precision in other criminal prosecutions was insisted upon by Judge Bailey, who appears to have respected the common law doctrine that certainty, especially in criminal pleadings, was the least that could be expected when the power of the State was turned against an individual.²²

In the realm of family law, he decided for the first time that the grounds for divorce set forth in the statute²³ were exclusive and would not permit of relief where the

²⁰ The decision stood until 1930, when, in *People ex rel. Swanson v. Fisher*, 340 Ill. 250, 172 N. E. 722, it was overruled by a court that seems to have felt that rules of law must struggle for existence in the strong air of practical life. The opinion of Judge McAllister, in *People ex rel. Lyons v. Hanchett, Sheriff*, 16 Chicago Legal News 320 (1884), on that score is just as pointed in the other direction. He wrote: "It would be just as competent, in my opinion, for the prisoner and State's Attorney to have agreed that the Clerk of the Court hear the case."

²¹ 130 Ill. 457, 22 N. E. 826 (1889).

²² See *Sykes v. People*, 132 Ill. 32, 23 N. E. 391 (1890), where a variance existed between the name of a corporate victim of embezzlement as pleaded and proved; *Prichard v. People*, 149 Ill. 50, 36 N. E. 103 (1894), indictment in bigamy prosecution quashed for errors of misnomer; and *Nowacryk v. People*, 139 Ill. 336, 28 N. E. 961 (1891), in which a judgment fixing the death penalty for murder was reversed to allow the defendant a chance to offer proof of his victim's previous hostile conduct not so much to change the nature of the crime but to allow a chance for possible mitigation of the capital punishment.

²³ Ill. Rev. Stat. 1937, Ch. 40, § 1.

defendant's fault consisted of addiction to drugs, even though the effect thereof was similar to that induced by habitual drunkenness.²⁴ He also held that the rule applied where an infant sues for personal injuries and is met with the defense that his parents were guilty of contributory negligence differs from that applied where the parents are suing for their loss occasioned by the same injury, the minor's action not being lost for such reason.²⁵ Another case pointed out that in order for the Family Expense Act²⁶ to bind the spouses for household debts contracted by either, they must in fact be living together as a family, and the statutory liability cannot arise where they are living apart.²⁷ His decision in *Crum v. Sawyer*²⁸ affirming the validity of post-nuptial agreements concerning release of dower has probably been referred to more often than any other case on that point decided by the Illinois Supreme Court.

Confusion had existed in the real property law of Illinois for approximately sixty-seven years over the question of whether or not it was possible to create an estate in joint tenancy.²⁹ The doubts were resolved by Judge Bailey by his decision in the case of *Mette v. Feltgen*,³⁰

²⁴ *Youngs v. Youngs*, 130 Ill. 230, 22 N. E. 806 (1889).

²⁵ *Chicago City Railway Company v. Wilcox*, 138 Ill. 370, 27 N. E. 899 (1891).

²⁶ Ill. Rev. Stat. 1937, Ch. 68, § 15.

²⁷ *Schlesinger v. Keifer*, 131 Ill. 104, 22 N. E. 814 (1889).

²⁸ 132 Ill. 443, 24 N. E. 956 (1890).

²⁹ The problem grew out of an act adopted January 15, 1821, which authorized partition between cointerests in a deed creating a common law joint tenancy and further provided that, if such partition did not occur during the joint lifetime of the cointerests, the heirs of any deceased grantee should take the ancestor's share as if the grant had been but a tenancy in common. Laws of 1821, p. 14. This was followed by an act adopted January 31, 1827, which authorized the creation of estates in joint tenancy where the deed expressly declared that the estate passed thereby was not a tenancy in common but a joint tenancy. Laws of 1827, p. 95. Both statutes were printed in the Revised Statutes of 1845, having been approved on the same day, and were again reenacted in the revision of 1874. The inconsistencies were revealed in Judge Bailey's decision and the later act was given precedence. The act of January 15, 1821, was finally repealed on June 30, 1919. Laws of 1919, p. 633.

³⁰ 148 Ill. 357, 36 N. E. 81 (1894).

which settled the problem by affirming the proposition that where a conveyance expressly declares that the estate conveyed to two or more grantees should pass, not in tenancy in common, but in joint tenancy, then such estate would carry with it the incidental common law right of survivorship and effectively cut off all possibility of inheritance by the heirs of that grantee who might die first.

His lengthy opinion in *Hale v. Hale*,³¹ affirmed the power of a court of equity to authorize the sale of non-productive real estate held by trustees under a will when the testator had failed to give the trustees any express power of sale. But just as property rights might be created, they might also be taken away, for at about the same time he was upholding the right of the state to regulate or prohibit fishing in waters within the state, even though the same were privately owned, wholly enclosed, and subject to no right of navigation in favor of the public.³²

The ingenious landlord who sought to increase his security for the payment of the rent reserved by providing in the lease that he should have "a valid and first lien for said rent, accruing or to accrue, upon the property of the person or persons liable therefor" discovered that his efforts had come to naught, as he had overlooked the fundamental proposition that, in the absence of apt words, no lien could attach to after-acquired property.³³ Another landlord, however, who had given a lease containing an option to purchase the demised premises, was enabled to free his lands from a mortgage placed thereon by the tenant, because the mortgagee could get no better rights than his grantor; so the forfeiture of the lease upon default would operate also to invalidate the mortgage.³⁴

³¹ 146 Ill. 227, 33 N. E. 858 (1893).

³² *People v. Bridges*, 142 Ill. 30, 31 N. E. 115 (1892).

³³ *Borden v. Croak*, 131 Ill. 68, 22 N. E. 793 (1889).

³⁴ *McCauley v. Coe*, 150 Ill. 311, 37 N. E. 232 (1894).

The problems of drainage occupied Judge Bailey's attention also, for he upheld the Drainage Act of 1885³⁵ against an attack on its constitutionality, though in order to do so he was obliged to amplify the language of the legislature in regard to the payment of compensation.³⁶ He likewise held that an easement of drainage taken in favor of the public was a perpetual one and thus amounted to a freehold estate, so that the Supreme Court had jurisdiction on appeal.³⁷ An assessment levied for the cost of drainage improvements was held to be a lien upon lands of the same nature and subject to the same general rules as those applicable in the case of general taxes.³⁸ The leading case, however, is probably *Village of Dwight v. Hayes*,³⁹ which settles the right of the riparian owner to enjoin a municipality from dumping sewage into an open creek in such a fashion as to constitute a nuisance.

One other problem in the law of real property may be mentioned. In the case of *Kozel v. Dearlove*⁴⁰ a proceeding was begun to compel the execution of a deed by the executors of a deceased vendor who, during his lifetime, had, through an agent, entered into a contract to sell said premises to the petitioner. The vendor had given written authority to the agent to sell the land at a named price. The sale had been consummated at a lower figure, but the reduction had been orally approved by the vendor. Performance of the contract was denied on the ground that there was no sufficient memorandum of authority to satisfy the provisions of the Statute of Frauds,⁴¹ since to

³⁵ Laws, 1885, p. 77; Ill. Rev. Stat. 1937, Ch. 42, §§ 82-166.

³⁶ *Chronic v. Pugh*, 136 Ill. 539, 27 N. E. 415 (1891).

³⁷ *Chaplin v. Commissioners of Highways*, 126 Ill. 264, 18 N. E. 765 (1888), reversing earlier decisions in *Lucan v. Cadwallader*, 114 Ill. 285, 7 N. E. 286 (1885) and *Eckhart v. Irons*, 114 Ill. 469, 6 N. E. 15 (1885).

³⁸ *Wabash Eastern Railway Co. of Ill. v. Commissioners of East Lake Fork Special Drainage District*, 134 Ill. 384, 25 N. E. 781 (1890).

³⁹ 150 Ill. 273, 37 N. E. 218 (1894). This decision has been cited in practically every similar case since then, being last referred to in *March, 1938*, in *Eckart v. City of Belleville*, 294 Ill. App. 144, 13 N. E. (2d) 641 (1938).

⁴⁰ 144 Ill. 23, 32 N. E. 542 (1892).

⁴¹ Ill. Rev. Stat. 1937, Ch. 58, § 2.

sell upon different terms required a new authority in writing.

Two decisions in the realm of money and banking are worthy of notice. In the first,⁴² Judge Bailey held that the act of the payee or holder of a check in procuring its certification by the bank on which it was drawn constituted a discharge of the maker. He was careful, however, to distinguish the problem from that which arises when the drawer procures the certification before delivery.⁴³ The other case⁴⁴ involved the ability of a depositor to secure the return of the actual checks deposited by him on the day preceding the closing of an insolvent bank. Judge Bailey, applying a statute⁴⁵ then in force,⁴⁶ held that a prima facie presumption existed, in both civil and criminal cases, that the receiving of such a deposit under such circumstances was fraudulent, and he therefore allowed the depositor to recover his property so secured. Much of the grief arising during the recent depression from the conduct of bankers who accepted deposits up to the moment the doors were closed would have been obviated had the legislature refrained from repealing the law.⁴⁷

The Supreme Court justice must necessarily pass on many problems during his career, and the diversity thereof is bounded only by the variety of the problems which beset his fellow men. So, too, it was with Judge Bailey, who wrote opinions on many subjects. Thus in *Junker v. Rush*⁴⁸ he limited the right of the surety to seek indem-

⁴² Metropolitan Bank of Chicago v. Jones, 137 Ill. 634, 27 N. E. 533 (1891).

⁴³ On that point see Bickford v. First National Bank of Chicago, 42 Ill. 238 (1866).

⁴⁴ American Trust and Savings Bank v. Gueder & Paeschke Manufacturing Company, 150 Ill. 336, 37 N. E. 227 (1894).

⁴⁵ Laws of 1879, p. 113, § 2.

⁴⁶ Amendment of May 13, 1903, Laws of 1903, p. 156, § 1, deleted the provision relied on in the case under consideration. Ill. Rev. Stat. 1937, Ch. 38, § 61.

⁴⁷ The current answer to the same proposition may be found in *People ex rel. Nelson v. Sheridan Trust and Savings Bank*, 358 Ill. 290, 193 N. E. 186 (1934).

⁴⁸ 136 Ill. 179, 26 N. E. 499 (1891).

nity from the principal debtor to a period of five years, on the basis that the obligation was an implied one, even though the surety contract itself were a specialty on which the period of limitation was ten years. In *Dinwiddie v. Self*⁴⁹ he drew a nice discrimination between cases in which equity could not correct a mistake of law knowingly made and those in which it could, as where the parties had mistakenly used unintended legal terms. He could relieve a municipality from liability for torts committed by its dog-catcher on the ground the latter was acting under the police power of the state⁵⁰ and turn, with equal facility, to a tax problem involving the precise meaning of the words "last assessment" and decide that they meant the current one.⁵¹

The majority of his decisions, though, were on questions involving procedural points which, while not likely to bring him before the public eye, mark him as a lawyer skilled in understanding the difficulties inherent in any human system for the disposition of conflicting claims. In *Capes v. Burgess*⁵² he pointed out that garnishment is a method for reaching only such liquidated demands as could, between the original parties, have been made the basis of an action of debt or indebitatus assumpsit, and that unliquidated demands, such as damages for breach of warranty, could not be subjected to garnishment. Similarly he held that a suit in equity cannot be so amended by an intervening petitioner as to become an entirely different action proceeding on a different theory from that originally commenced.⁵³ Just as the fundamental distinctions between actions had to be preserved, so, too, the orderly processes of pleading required observance of the rules of certainty. Thus, in *McFarland v. Claypool*,⁵⁴ a

⁴⁹ 145 Ill. 290, 33 N. E. 892 (1893).

⁵⁰ *Culver v. City of Streator*, 130 Ill. 238, 22 N. E. 810 (1889).

⁵¹ *Wabash Railroad Company v. People*, 147 Ill. 196, 35 N. E. 157 (1893).

⁵² 135 Ill. 61, 25 N. E. 1000 (1890).

⁵³ *Fairbanks v. Farwell*, 141 Ill. 354, 30 N. E. 1056 (1892).

⁵⁴ 128 Ill. 397, 21 N. E. 587 (1889). The plea read that defendant "within two years last past has not fraudulently conveyed, etc." The court pointed out that this did not cover the entire period of two years prior to the date of the attachment affidavit and hence was an inadequate answer to the same.

plea in abatement to an attachment action denying the grounds set forth in the jurisdictional affidavit was held bad as being in the present tense when it should have been in the past tense.

Procedural steps, too, must be taken in proper order, at the time fixed and in the manner provided by law. No one man's urgent need should swerve the law from its methodical progress if existing procedure is available to prevent a miscarriage of justice. That, at least, was a lesson which grew out of the World's Columbian Exposition for one concessionaire whose souvenirs were levied upon by attachment and who sought their return by an immediate trial before process was returned, instead of by posting the duly provided bond. The fact that his property would become worthless in a few days was no reason for changing the established rule that no case may stand for trial prior to the return day named in the summons.⁵⁵ In *Matzenbaugh v. Doyle*,⁵⁶ it was decided that judgment by confession would not lie upon a warrant of attorney contained in a note which, upon its face, appeared to be barred by the statute of limitations, since, the note being barred, the warrant contained therein had become *functus officio*.

The rules of evidence also received attention in two instances. The case of *Peoria Gas Light and Coke Company v. Peoria Terminal Railway Company*⁵⁷ introduced into the law of Illinois the doctrine that, in eminent domain proceedings, testimony relating to the value of the premises sought to be condemned must not include proof as to what petitioner has paid for other lands along the same right of way, since such sales are treated as being

⁵⁵ *Hecht v. Feldman*, 153 Ill. 390, 39 N. E. 121 (1894). The statute applied was Cahill's Ill. Rev. Stat. 1931, Ch. 110, § 1. The defendant could have secured the return of his property upon filing either a forthcoming bond for the property or a bond to pay whatever judgment might be rendered. Cahill's Ill. Rev. Stat. 1931, Ch. 11, §§ 14 & 15. The modern practice would be regulated by Ill. Rev. Stat. 1937, Ch. 110, § 259.4 and Ch. 11, §§ 14-15.

⁵⁶ 156 Ill. 331, 40 N. E. 935 (1895).

⁵⁷ 146 Ill. 372, 34 N. E. 550 (1893).

forced or compulsory sales and not such as would disclose the free, open market value of the property in question. The common law practice, enforced by a statute enacted in 1887,⁵⁸ regarding the use of special and general verdicts received consideration in the case of *Chicago and Northwestern Railway Company v. Dunleavy*,⁵⁹ which included a thorough analysis of the problem since the time of Edward I. The court concluded that special verdicts were proper, provided they found the existence of ultimate facts and not merely evidentiary ones, and that then the special verdict would override the general verdict only if irreconcilable conflict existed between them. Judge Bailey was also asked to abrogate the parole evidence rule in order to allow proof of the testator's actual intention in a case where the testator had misdescribed the lands devised.⁶⁰ He indicated that, were the case one of first impression, he might be inclined to allow such an offer, but in view of earlier precedents, he felt that the point was no longer one of evidence subject to judicial control but had become a rule of property; hence the offer had to be denied.

The scope of the jurisdiction of the Probate Court of Cook County was extended when, in *Newell v. Montgomery*,⁶¹ he held constitutional a statute enacted in 1887⁶² making it possible to join, in a petition to sell real estate to pay debts, all persons claiming some interest in the property in question, whether adverse or not. He also settled⁶³ the problem of appellate jurisdiction in cases of appeal from a decision on a claim against a decedent's estate. It had been contended that such appeals went directly to the Appellate Court under the act

⁵⁸ Laws of 1887, p. 251, text of which may be found, with slight modification, in Ill. Rev. Stat. 1937, Ch. 110, § 189.

⁵⁹ 129 Ill. 132, 22 N. E. 15 (1889).

⁶⁰ *Bingel v. Volz*, 142 Ill. 214, 31 N. E. 13 (1892).

⁶¹ 129 Ill. 58, 21 N. E. 508 (1889).

⁶² Laws of 1887, p. 3, currently found in Ill. Rev. Stat. 1937, Ch. 3, § 100.

⁶³ *Grier v. Cable*, 159 Ill. 29, 42 N. E. 395 (1895).

creating that court, which contained a provision giving it jurisdiction in cases of appeals from final judgments in "any suit or proceeding at law or chancery."⁶⁴ He pointed out that the proceedings for the allowance of such claims were purely statutory and were not common law actions in the sense meant by the Appellate Court Act; and he ruled that appeal properly lay to the circuit court of the same county for a trial de novo.⁶⁵ Appellate jurisdiction was also reinforced by *Wilson v. Scoville*,⁶⁶ holding that a certificate of importance from the Appellate Court is a condition precedent, in certain cases, to review by the Supreme Court, and that the time limit fixed by law in which to secure the same is mandatory and not subject to extension; and in *City of Virginia v. Gipps Brewing Company*⁶⁷ he decided that only final judgments of the Appellate Court were reviewable and that a decision of that court to reverse and remand with directions to permit a party to plead was not a "final" judgment.⁶⁸

Mention might also be made of some decisions which, while not of importance in the formulation of the law of Illinois, have some significance in local social history. Thus, in *People ex rel. Longenecker v. Nelson*,⁶⁹ Judge Bailey affirmed the constitutionality of the act creating the Sanitary District of Chicago. In *Lieberman v. Chicago and South Side Rapid Transit Railroad Company*⁷⁰ he held the charter of the corporation sufficient to allow for the construction of an "elevated" railroad, disregarding the contention that the grant was only one to build a surface carrier. The existence of a system of parks in the Chicago area operating as a separate government

⁶⁴ Modified in other particulars, the language of that act appears in Ill. Rev. Stat. 1937, Ch. 37, § 32 (1).

⁶⁵ See Ill. Rev. Stat. 1937, Ch. 3, § 69.

⁶⁶ 127 Ill. 393, 20 N. E. 88 (1889).

⁶⁷ 136 Ill. 616, 27 N. E. 196 (1891).

⁶⁸ See Ill. Rev. Stat. 1937, Ch. 110, § 199 (2).

⁶⁹ 133 Ill. 565, 27 N. E. 217 (1890).

⁷⁰ 141 Ill. 140, 30 N. E. 544 (1892). The road so built was put in operation in time for the World's Columbian Exposition of 1893.

within the area occupied by another municipality was held legally possible in *West Chicago Park Commissioners v. City of Chicago*.⁷¹ As far back as 1893⁷² he approved a statute which allowed women to vote at elections for nonconstitutional school officials, holding that the constitutional provision restricting suffrage to male persons⁷³ applied only to the election of constitutional officers. At about the same time he reversed the conviction of Daniel Coughlin and others on a charge of murder and left forever unanswered the oft-repeated question: "Who killed Doctor Cronin?"⁷⁴

Only two of Judge Bailey's decisions were carried to the Supreme Court of the United States. In one his decision was automatically affirmed by the upper court in refusing to take jurisdiction;⁷⁵ in the other, however, he was reversed. That was the case of *Harmon v. City of Chicago*,⁷⁶ in which he had held valid a city ordinance imposing a license fee on tugs and other towing vessels operating in the Chicago River and adjacent harbor waters, on the ground that the fee imposed was recoverable by way of compensation for improvements made by the municipality,⁷⁷ following the doctrine of an earlier United

⁷¹ 152 Ill. 392, 38 N. E. 697 (1894).

⁷² *Plummer v. Yost*, 144 Ill. 68, 33 N. E. 191 (1893).

⁷³ Illinois Constitution, 1870, Art. VII, § 1, since rendered nugatory by U. S. Constitution, Amendment XIX.

⁷⁴ *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1 (1893). This *cause celebre*, known as the "Clan-na-Gael Case," aroused great excitement at the time, coming shortly after the Haymarket riots and adding further demonstration that the "Melting Pot" of American civilization still possessed volcanic possibilities. See *Spies v. People*, 122 Ill. 1, 12 N. E. 865 (1887). A further sidelight is found in the *per curiam* opinion in *O'Sullivan v. People*, 144 Ill. 604, 32 N. E. 192 (1892), holding that a writ of error in a criminal case must abate on death of the petitioner and thereafter the courts are powerless to do anything to remove the stain of a conviction, no matter how much they may believe in the innocence of the defendant.

⁷⁵ *Union National Bank of Chicago v. Louisville, New Albany and Chicago Railway Company*, 145 Ill. 208, 34 N. E. 135 (1893), writ of error dismissed 163 U. S. 325, 16 S. Ct. 1039, 41 L. Ed. 177 (1896), held that a state statute concerning usury applied to national banks as well as state banks.

⁷⁶ 140 Ill. 374, 29 N. E. 732 (1892).

⁷⁷ The ordinance, set out in the opinion, was silent on the reasons for the imposition of the license fee as well as on the disposition to be made of funds thus procured.

States Supreme Court decision.⁷⁸ The opinion reversing Judge Bailey was written by Mr. Justice Field and is predicated on the fact that, in the absence of language indicating the purpose of the levy, it must be presumed to be a tax on the use of navigable waters and hence unconstitutional.⁷⁹

In the passage of time only three of his decisions have been subsequently overruled by later Illinois cases.⁸⁰ The common sense standard of mental capacity to make a will⁸¹ which he advocated in *Keithley v. Stafford*,⁸² one of his first decisions on the Supreme Court bench, was reviewed five years later in the case of *Greene v. Greene*⁸³ and shown to be inadequate, though the court confessed that it was difficult to formulate any other standard. Still on the court at that time, he registered no dissent. The other case is *Ewing v. Barnes*,⁸⁴ in which he held that a limitation of a fee upon a fee could not be created by devise, apparently confusing the problem with the one which arises when the attempt is made by deed. The error was corrected shortly after his death in the case of *Glover v. Condell*.⁸⁵

While he wrote only one concurring opinion,⁸⁶ he did

⁷⁸ *Huse v. Glover*, 119 U. S. 543, 7 S. Ct. 313, 30 L. Ed. 487 (1886).

⁷⁹ *Harmon v. City of Chicago*, 147 U. S. 396, 13 S. Ct. 306, 37 L. Ed. 216 (1893).

⁸⁰ *Harris v. People*, 128 Ill. 585, 21 N. E. 563 (1889), has already been mentioned. See note 18. A fourth case, *Hull v. City of Chicago*, 156 Ill. 381, 40 N. E. 937 (1895), is listed as being overruled by *McChesney v. People ex rel. Kochersperger*, 171 Ill. 267, 49 N. E. 491 (1898). The language of the later case does state that insofar as the decisions conflict with the Hull case that decision is overruled. Analysis will show there is no conflict, as two related but different questions are involved.

⁸¹ He approved an instruction which stated: "By sound mind and memory is meant that his mind and memory were such as to be able to transact the ordinary business of life."

⁸² 126 Ill. 507, 18 N. E. 740 (1888).

⁸³ 145 Ill. 264 at p. 276, 33 N. E. 941 at p. 943 (1893).

⁸⁴ 156 Ill. 61, 40 N. E. 325 (1895).

⁸⁵ 163 Ill. 566, 45 N. E. 173 (1896). See also Albert M. Kales, *Estates, Future Interest and Illegal Conditions and Restraints in Illinois* (Chicago: Callaghan & Co., 1920), 542-6.

⁸⁶ *Palmer v. City of Danville*, 154 Ill. 156, 38 N. E. 1067 (1894), in which he indicated that he was opposed to making public improvements with public money to tie in with private systems so as to place the whole under private domination.

dissent a total of sixteen times; but in only five instances did he record his views.⁸⁷ It does not appear that such views have as yet been adopted.

The high quality of his work shines through every decision even to the very end, but his intimates knew that a light had gone out of his life when in 1891 his son, Joseph M. Bailey, Jr., not yet 27, died suddenly while visiting his parents at Freeport.⁸⁸ Still he resolutely labored on, though suffering from Bright's disease,⁸⁹ until the adjournment of the court in the summer of 1895, when he returned to his home at Freeport to recuperate, taking with him the records of thirty-three cases which had been assigned to him that term.⁹⁰ He was, however, destined never to meet his brethren again, for late that summer, as court was about to convene, he collapsed, dying on October 16, 1895.

Word of his death brought expressions of grief from

⁸⁷ *Gage v. Hampton*, 127 Ill. 87 at 96, dissent not printed in 20 N. E. 12 (1889), turns on the sufficiency of evidence to establish payment of taxes. *Dupee v. Swigert, Auditor*, 127 Ill. 494 at 506, 21 N. E. 622 at 625 (1889), cautions the majority against passing on constitutional questions not before the court. *Tyler v. Sanborn*, 128 Ill. 136 at 146, 21 N. E. 193 at 195 (1889), deems the purchase of realty by a wife with her own funds from husband-agent at price approved by owner, no fraud in fact being present, as being insufficient to become basis of presumption of fraud. *Price v. People*, 131 Ill. 223 at 234, 23 N. E. 639 at 642 (1890), dealt with change of venue in criminal case on ground of prejudice of the inhabitants of the county. *Snyder v. Snyder*, 142 Ill. 60 at 70, 31 N. E. 303 at 306 (1892), urged that on appeal to circuit court on issue of insanity that court is without jurisdiction to do more than hear the case de novo and should not proceed to appoint a conservator.

⁸⁸ Born Nov. 4, 1864, at Freeport, Illinois, Joseph M. Bailey, Jr., migrated to Sioux Falls in the Territory of Dakota at an early age and there engaged in the banking business. Prior to his death he was territorial treasurer of the Dakotas, the last to hold that office, since the admission of North and South Dakota into the union occurred in 1889. Death occurred on September 12, 1891.

⁸⁹ His condition was probably aggravated by his size—he is said to have weighed 250 pounds—and his efforts to reduce. Judge Shope mentioned that he used to ride a bicycle ten or fifteen miles a day in order to cut down his weight. See *Chicago Tribune*, Oct. 17, 1895, Vol. LIV, No. 290, p. 5.

⁹⁰ Rest did not mean idleness to Judge Bailey, for shortly before the end he remarked to a friend: "I am sorry I have not completed all the cases assigned to me at the last term. Of the thirty-three, I have written opinions in twenty and left thirteen unwritten. That is not so bad, but I regret I am not able to finish the work assigned to me." *Chicago Legal News*, Oct. 19, 1895, Vol. 28, No. 8, p. 60.

bench and bar. Courts adjourned; special trains were run to accommodate the hundreds who desired to attend his funeral; a most imposing demonstration of respect was made. Standing beside the grave as his mortal remains were lowered into the earth were his late associates upon the Supreme Bench, but one venerable figure drew the attention of all eyes. Eighty-four-year-old former Justice Sheldon, who was sitting on the Circuit Bench of the Thirteenth Circuit when Joseph Meade Bailey⁹¹ was admitted to the bar, who (while on the Supreme Court) was instrumental in the selection of Bailey for service on the Appellate Court, and who had been his predecessor on the Supreme Court, saw a glorious career of public service pass in review before his eyes that afternoon.

⁹¹ Judge Bailey's middle name usually appeared in print as an initial. In the few instances where it was spelled out it appears in the form used in this article. The author has received advice from Theodore M. Bailey, a practicing lawyer at Sioux Falls, S. D., grandson of the Judge, and son of the now deceased Charles O. Bailey, that the correct spelling should be "Mead." He also writes that five children were born to Joseph M. and Anna O. Bailey, two of whom died in infancy. A daughter, named after her mother, died at the age of seventeen in 1886. The remaining children were Charles O. Bailey, born July 2, 1860, died Dec. 20, 1928, who, during his lifetime, was senior member of the law firm of Bailey, Voorhees, Woods and Bottum of Sioux Falls, South Dakota, and the Joseph M. Bailey, Jr., referred to in footnote 88. The only living descendants of Judge Bailey are the children and grandchildren of Charles O. Bailey, all of whom reside in Sioux Falls, S. D.